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York Court of Appeals.²³ The principal case deserves consideration only as an interesting legal anachronism.

THE AIR SPACE AS CORPOREAL REALTY. — Is the air space a corporeal part of the realty, and if so, may any portion of it exist as a separate freehold apart from the soil beneath it? A century ago Lord Ellenborough, explaining his decision by supposing a case of an aeronaut traversing the air in a balloon high over divers closes, held that trespass did not lie for a board projecting over the plaintiff's garden.¹ So also, shots passing at an average height of seventy-five feet have been treated as nuisances, rather than trespasses.² The tendency of the old English cases seems to be to treat overhanging cornices and the like on the same basis,³ although that, perhaps, may be largely because the remedy of abatement was more desired than damages, and because the equitable jurisdiction to enjoin trespasses was slow in developing. The theory has accordingly been advanced that the air is only in the nature of an appurtenance to facilitate the enjoyment of the soil.⁴

It is clearly established, however, that there may be two or more distinct freeholds in a building over the same spot,⁵ and when a building thus owned is destroyed, a question arises whether an owner of a portion of it who had no rights in the soil can claim the space formerly occupied by his property. It is evident that a mere lease for a term generally con-

²³ "The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." *Bertholf v. O'Reilly*, 74 N. Y. 509, 514.

¹ *Pickering v. Rudd*, 4 Camp. 219. See *Bagram v. Karformah*, 3 Beng. L. R. Orig. Jur. Civ. 18, 43.

² *Clifton v. Viscount Bury*, 4 T. L. R. 8.

³ *Baten's Case*, 9 Co. 53 (b); *Penruddock's Case*, 5 Co. 100 (b), citing *Rolf's case*, *Pasch*, 25 Eliz. See *Beswick v. Combdon Moor* 353. These cases were followed in 1845. *Fay v. Prentice*, 1 C. B. 828. Cases of overgrowing trees or vegetation seem *sui generis*. No action lies in England unless the damages are very substantial. See *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5, 10; *Smith v. Giddy*, [1904] 2 K. B. 448, 450. But the landowner may cut these obstructions at will. *Lemmon v. Webb*, [1895] A. C. 1.

⁴ See *Kuhn* in 4 AM. J. INT. L. 109, 122-128, citing *Corbett v. Hill*, L. R. 9 Eq. 671; see also 71 CENT. L. J. 1.

⁵ *Loring v. Bacon*, 4 Mass. 575; *Cheeseborough v. Green*, 10 Conn. 318; *Rhodes Pegram & Co. v. McCormick*, 4 Ia. 368; *McCormick v. Bishop*, 28 Ia. 233; *Ottumwa Lodge v. Lewis*, 34 Ia. 67; *Keilw.* 98, pl. 4; see *Doe v. Burt*, 1 T. R. 701, 703; *Anon.*, 11 Mod. 7; *Graves v. Berdan*, 26 N. Y. 498, 501; *Harris v. Ryding*, 5 M. & W. 60, 71; *Dugdale v. Robertson*, 3 Kay & J. 695, 700; *Smart v. Morton*, 5 E. & B. 30, 47; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449, 450; *Co. Lit.* 48 (b); *SHEP. TOUCH.* 206; ² *WASHB.*, *REAL PROP.*, 6 ed., 342. But cf. "Per le vend de l'auncester, il fuit main-ténat disanexe del franktenemt, et vesty en l'achatour come chattel," Count D'Arundel's Case, Y. B. 11 HEN. IV, 32.

templates the transfer of no such right, and it would be highly inconvenient if the law created it.⁶ An estate in fee may also be intended to embrace only a portion of the building itself and not the space it occupies; but the question still remains whether ownership of unattached air space is possible where a clear attempt is made to create it.⁷ In a recent South Carolina case the owner of several adjacent lots conveyed one of the middle ones, limiting the right of the grantee and assigns to build to a height of fourteen feet above the ground, and reserving the right to build above the fourteen foot level. The parties then built in accordance with an understanding evidenced by contracts which expressly bound the assigns of both, and which provided for rebuilding under the same conditions in case of fire. The grantee, the ground floor man, assigned to the plaintiff, subject to the contracts with the grantor. A fire having occurred, and the building having been rebuilt, the plaintiff complained of the obstruction of a skylight secured to him by the contract between the parties to the original conveyance.⁸ Decision was rendered in his favor. *Pearson v. Matheson*, 86 S. E. 1063.

This result might be reached on the ground that the attempted exception or reservation failed, and that hence the plaintiff owned the whole property absolutely, but it is of interest to inquire whether that is the ground upon which to proceed. The court adopted what is submitted to be the sound theory, that the grantor retained a corporeal freehold in the air, and that this was servient to an easement of light in favor of the lower freehold. In spite of the indications to the contrary above set forth, the general common law view seems still to be that a piece of land is thought of as a solid of indefinite extent upwards and downwards. The American cases, while divided upon the question whether ejectment lies for permanent encroachments above the surface,⁹

⁶ *Stockwell v. Hunter*, 11 Metc. (Mass.) 448; *Winton v. Cornish*, 5 Oh. 477; *Kerr v. Merchants Exchange Co.*, 3 Edw. Ch. 315; *Graves v. Berdan*, 26 N. Y. 498. Such is *a fortiori* true of church pews although they may be separately owned as realty. *Daniel v. Wood*, 1 Pick. (Mass.) 102; *Gay v. Baker*, 17 Mass. 435; see *Church v. Wells' Executors*, 24 Pa. St. 249, 251; *Aylward v. O'Brien*, 160 Mass. 118, 126, 35 N. E. 313, 314.

⁷ Duranton, discussing the destruction of a house of several stories each owned by a different proprietor, suggests that a single proprietor should be compelled to contribute to rebuilding if the others so desire, or forfeit his rights, but he apparently is not certain just what those rights are. He continues: "Mais nous ne croyons pas que, par l'effet de cette destruction, le terrain soit devenu commun, de manière à devoir être partagé ou licité entre les divers propriétaires, même proportionnellement à la valeur relative qu'avait chaque étage avant la destruction ou la démolition de l'édifice; sauf à eux à établir une communauté à ce sujet, sin bon leur semble; car le propriétaire du rez-de-chaussée ne doit point être forcé d'en céder une partie plus ou moins considérable; et, vice versa, les autres peuvent avoir intérêt au rétablissement de leur étage pour l'avoir en entier." 5 COURS DE DROIT FRANÇAIS, § 488.

⁸ The court assumes, without discussing on this point matters other than the expressed and apparent intention of all the parties, that both the benefit of the servitude here mentioned, and the burden of another given in consideration therefor, ran to the assignee.

⁹ The weight of authority seems to allow ejectment. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716; *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365; *McCourt v. Eckstein*, 22 Wis. 153; *Sherry v. Frecking*, 4 Duer (N. Y.), 452; cf. *Rasch v. Noth*, 99 Wis. 285, 74 N. W. 820; *Zander v. Valentine Blatz Brewing Co.*, 89 Wis. 164, 61 N. W. 763. *Contra*, *Norwalk, etc. Co. v. Vernam*, 75 Conn. 662, 55 Atl. 168; *Aiken v. Benedict*, 39 Barb. (N. Y.) 400; *Vrooman v. Jackson*, 6 Hun (N. Y.) 326; cf. *Wil-*

seem to support this theory,¹⁰ and *dicta* of Lord Blackburn,¹¹ Lord Fry,¹² and Lord Bowen¹³ have caused a difference of opinion among text writers as to how the English law stands to-day.¹⁴ The attention of the aeronautic jurists, many of whom, especially on the continent of Europe, have favored the view that the air is free to all, has been directed chiefly toward questions of international law, and the rights in the upper strata, and probably comparatively few, if confronted with the present case, would deny private ownership of the air to the height of the building involved.¹⁵ It appears definitely from the mining cases that *terra firma* may be divided by horizontal boundaries so that the space occupied by removed minerals may remain in the mine owner and not in the owner of the surface.¹⁶ If the air space above the surface is cor-

marth *v.* Woodcock, 58 Mich. 482, 25 N. W. 475. And ejection does not lie for incorporeal hereditaments, Chism *v.* Smith, 138 App. Div. (N. Y.) 715.

¹⁰ Smith *v.* Smith, 110 Mass. 302; see Winton *v.* Cornish, 5 Oh. St. 477, 478; 1 WASHEB., REAL PROP., 6 ed., 3; cases cited in n. 9, *supra*. But where a landowner recovered from a balloonist for falling on his land the court said: "I will not say that ascending in a balloon is an unlawful act, for it is not so." See Guille *v.* Swan, 19 Johns. 381, 383. Cf. Scott's Trustees *v.* Moss, 17 Ct. of Sess. 4th ser. (1889) 32.

¹¹ "That . . . raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, but not the legal reason of it." See Kenyon *v.* Hart, 6 B. & S. 249, 252.

¹² "An ordinary proprietor of land can cut and remove a wire placed at any height above his freehold." See Wandsworth Board of Works *v.* United Telph. Co., 13 Q. B. D. 904, 927.

¹³ S. c. at p. 919. See also Brett, M. R., at p. 915.

¹⁴ See HAZELTINE, LAW OF THE AIR, 75, 76; POLLOCK, TORTS, 9 ed., 357-359; SALMOND, TORTS, 2 ed., 165, 166; Baldwin in 4 AM. J. INT. L. 95, 97, 98; see also, 51 SOL. J. 771. The old maxim "cujus est solum, ejus est usque ad coelum et ad inferos" has been frequently quoted, sometimes with slight variations, from Coke's day to the present time. See CO. LIT. 4 (2); 2 BL. COM. 18; GALE, EASEMENTS, 8 ed., 6; 1 WILLIAMS, REAL PROP., 22 ed., 34; Butler *v.* Frontier Telph. Co., 186 N. Y. 486, 491, 79 N. E. 716, 718, 51 SOL. J. 771; Central London Ry. Co. *v.* London Tax Com'rs, [1911] 1 Ch. 467, 479, [1911] 2 Ch. 467, 473, 486.

¹⁵ See Fauchille's proposed codes, 19 ANNUAIRE, DE L'INST. DE DR. INT. 19, 32-34; 2 REV. DE LA LOCOMOTION AÉRIENNE, 206; Vote of the Society in 1906 ANNUAIRE, 295, 299, 305; CATELLINI LE DROIT AÉRIEN (trad. par Bouteloup), 11-15, 22-28; MEILE, DAS LUFTSCHIFF IM INTERNEN RECHT & VÖLKERRECHT, 27-28; Blewett Lee, 1913, TENN. BAR. ASSN. 53, 59-73. Valentine 14 AM. L. N. 69; 51 SOL. J. 771. By the French code the landowner owns upward without limit CODE NAP. ART. 552. But see CATELLINI LE DROIT AÉRIEN, 14. In Germany he has nominal ownership, but he may not forbid interference at such a height that he has no interest in its prevention. GER. CIV. CODE, § 905. The Swiss code affirmatively limits ownership to the requirements of use. SWISS CIV. CODE, § 667. The air was free by the Roman law. JUST. INST. BK. II, tit. 1, § 1; DIG. BK. I, tit. 8, § 2, 1. By the civil law the air was free. See 4 BURGE, COL. & F. LAWS, 321, 323; Herbert's GROT. INTROD. TO DUTCH JURIS. BK. II, CH. 1, § 23; GROT. DE JURI BELLI ET PACIS, Lib. II, Cap. 2, § 3. But cf. HAZELTINE, LAW OF THE AIR, 76.

¹⁶ Wilkinson *v.* Proud, 11 M. & W. 33; Duke of Hamilton *v.* Graham, L. R. 2 H. L. (Sc.) 166; Earl of Cardigan *v.* Armitage, 2 B. & C. 197, 211; Harris *v.* Ryding, 5 M. & W. 60, 66, 73, 76; Batten Poole *v.* Kennedy, [1907] 1 Ch. 256; Ramsey *v.* Blair, 1 A. C. 701, 703; Dand *v.* Kingscote, 6 M. & W. 174 (*semble*); Proud *v.* Bates, 34 L. J. Ch. 406; Caldwell *v.* Fulton, 31 Pa. St. 475; Massot *v.* Moses, 3 S. C. 168. But the mine rights have been spoken of as carved out of the fee in Massachusetts. See Adams *v.* Briggs Iron Co., 7 Cush. 361, 367. Of course, the right granted in a mine may be only a license or *profit à prendre*. Rogers *v.* Taylor, 1 H. & N. 706; Doe *v.* Wood, 2 B. & Ald. 724; Chetham *v.* Williamson, 4 East 469; Clement *v.* Youngman, 40 Pa. St. 341; Funk *v.* Haldeman, 53 Pa. St. 229. See CO. LIT. 164 b.

poreal realty, it is submitted that it may be divided into separate free-holds by horizontal planes.¹⁷

If, however, air space is incorporeal, a less desirable, but a possible solution of the principal case is to consider the right to occupy the air as an easement appurtenant to the grantor's adjacent land, analogous to a very extensive right to bridge.¹⁸ However, if there are any sufficient practical reasons why air space should not constitute corporeal hereditaments, they would seem to be of the nature of the considerations which lie back of the policy against novel incidents, and they should be equally fatal to such an easement. If this difficulty were surmounted in favor of the grantor, however, the easement of light here claimed by the plaintiff might well run in equity against the grantor's easement as a servient tenement.¹⁹

THE POWERS OF CONSTITUTIONAL CONVENTIONS. — What is the nature and power of a constitutional convention? What is its relation to the other branches of government? May the legislature limit the powers of the convention? Can the courts enforce such restrictions?¹ These questions are suggested by the decision of the Louisiana Supreme Court in *Foley v. Democratic Parish Committee*, 70 So. 104 (La.).² In that case clauses in a new constitution, enacted by a constitutional con-

¹⁷ See HAZELTINE, LAW OF THE AIR, 79. Horizontal division of realty was unknown in the Roman law, and rights in a horizontal stratum were regarded as a servitude upon the fee. See HAZELTINE, op. cit. 74; 51 Sol. J. 771. The incidents of the *ius superficiarium* were in accord with this conception. See 4 BURGE, COL. & F. LAWS, 336.

¹⁸ An easement carries with it all subsidiary easements necessary for its enjoyment. See GALE, EASEMENTS, 8 ed., 492-494. In the present case, then, whether the easement or the better fee theory be followed, there would be a right to the support of the grantee's building at least before the fire. Such a right is an incident to the ownership of any upper chambers. *McConnel v. Kibbe*, 33 Ill. 175; *Keilw.* 98, pl. 4; *Caledonian Ry. Co. v. Sprot, 2 Macq.* 449, 450; *Harris v. Ryding*, 5 M. & W. 60, 71; *Smart v. Morton*, 5 E. & B. 30, 47; *Dugdale v. Robertson*, 3 Kay & J. 695, 700. In accord with this are cases holding that one owner can not recover from the other contribution for repairs made on his own part and benefiting the other. *Loring v. Bacon*, 4 Mass. 575; *Wiggin v. Wiggin*, 43 N. H. 561; *Ottumwa Lodge v. Lewis*, 34 Ia. 67. But the upper man must not increase the burden. 1 WASHB., REAL PROP., 6 ed., 18. Cf. CODE NAP. 640. The weight of authority is perhaps, that there is no affirmative duty to repair at common law. See *Tenant v. Goldwin*, 6 Mod. 311, 314; 1 Williams' Saund. (ed. 1871) 557, n. 1; TUD. LEAD. CAS. 3 ed., 219; 2 WASHB., REAL PROP., 6 ed., 342; see contra, Anon., 11 Mod. 7; *Keilw.* 98, pl. 4; *Cheeseborough v. Green*, 10 Conn. 318; *Graves v. Berdan*, 26 N. Y. 498, 501. There is such a duty in Scotland. ERSK. INST. (fol. ed.) 357. And in France, where the division of responsibility for the different parts of the house has been worked out with great elaboration. CODE NAP. 664; see 5 Duranton, COURS DE DROIT FRANÇAIS, 385-387; Merlin, REPERTOIRE DE JURIS. tit. Batiment, § 2.

¹⁹ See John Bros. Abergarw Brewery Co. v. Holmes, [1900] 1 Ch. 188; Hanbury v. Jenkins, [1901] 2 Ch. 401, 422; GALE EASEMENTS, 8 ed., 11.

¹ These questions are of peculiar interest in Massachusetts at the present time, since Governor McCall in his inaugural address, in recommending a constitutional convention to revise the Massachusetts constitution, suggested withholding the Bill of Rights and the articles relating to the judiciary from revision by the convention. THE BOSTON EVENING TRANSCRIPT, Jan. 6, 1916.

² Another recent case in Louisiana involves a similar decision. *State v. American Sugar Refining Co.*, 68 So. 742. For a statement of the facts of these cases, see RECENT CASES, p. 550.